Supreme Court, U.S.
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No. 92-764

In The

Supreme Court of the United States

October Term, 1992

DONNA ERICKSON,

Petitioner,

v.

PIERCE COUNTY and JOHN LADENBURG,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should exercise its discretionary authority to review the Ninth Circuit's decision that the evidence presented at trial was not sufficient to support a verdict in favor of Petitioner on her claim that she was dismissed from employment for a political reason in violation of the First Amendment, where the evidence showed that Petitioner tried to impede and hinder the operation of the office when the new prosecutor began to take over.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

A. Factual History 1

B. Procedural History 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 6

I. Petitioner Has Failed To Set Forth Any Special Or Important Reasons Why The Court Should Review The Ninth Circuit's Decision 7

A. The Federal Law Regarding First Amendment Restrictions On Employers Is Clear And Well-Defined; This Case Presents No Issue Which Requires Further Clarification From The Court 7

B. The Ninth Circuit Did Not Apply A "Substantial Or *Sole* Motivating Factor" Requirement In Conflict With The "Substantial Or *A* Motivating Factor" Requirement Of Other Federal Courts 8

C. The Ninth Circuit's Holding That, When Viewed In The Context Of The Entire Record, The Circumstantial Evidence In This Case Was Not Sufficient To Support A Verdict Against Respondents Does Not Conflict With The Decisions Of This Or Any Other Federal Court 12

TABLE OF CONTENTS – Continued

Page

D. Petitioner Incorrectly Asserts That The Second *Mt. Healthy* Element Of Proof Is Necessarily A Factual Issue Which Must Be Decided By A Jury In All Cases 19

E. The Ninth Circuit Did Not Misapply The Standard Of Review Of Judgments Notwithstanding The Verdict And Did Not Violate Petitioner's Seventh Amendment Right To A Jury Trial..... 23

F. Other Reasons Indicate That The Court Need Not Expend Its Time In Considering The Ninth Circuit's Decision In This Case..... 26

CONCLUSION 26

APPENDIX 1 (U.S. Const. amend. VII).....App. 1

TABLE OF AUTHORITIES

Page

CASES

Alaniz v. San Isidro Independent School Dist., 742 F.2d 207 (5th Cir. 1984) 16

Allen v. Scribner, 812 F.2d 426, *amended* 828 F.2d 1445 (9th Cir. 1987) 22

Anthony v. Sundlun, 952 F.2d 603 (1st Cir. 1991) 13

Branchick v. Commonwealth, Dept. of Labor & Industry, 496 Pa. 280, 436 A.2d 1182 (Pa. 1981) 15

Burgess v. Pierce County, 918 F.2d 104 (9th Cir. 1990) 16

Cohen v. Fred Meyer, Inc., 686 F.2d 793 (9th Cir. 1982) *disagreed with by Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985), *disapproved by Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) 22

Connell v. Sears, Roebuck & Co., 722 F.2d 1542 (Fed. Cir. 1983) 25, 26

Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1987) 21

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L. Ed. 2d 547 (1976) 7

Giacoletto v. Amax Zinc Corp., 954 F.2d 424 (7th Cir. 1992) 21

Gillette v. Delmore, 886 F.2d 1194 (9th Cir. 1989) 11, 19, 20

Graefenhain v. Pabst Brewing Co., 827 F.2d 13 (7th Cir. 1987) 21

Hudson v. Normandy School Dist., 953 F.2d 410 (8th Cir. 1992) 21

TABLE OF AUTHORITIES – Continued

Page

Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) 14

Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990) 13

Lowe v. Monrovia, 775 F.2d 998 (9th Cir. 1985) *amended*, 784 F.2d 1407 (9th Cir. 1986) 21

Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976) 23

Mays v. Williamson & Sons, Janitorial Services, Inc., 775 F.2d 258 (8th Cir. 1985) 21

Meyers v. City of Cincinnati, 934 F.2d 726 (6th Cir. 1991) 12, 20

Missouri National Education Ass'n v. New Madrid County R-1 School Dist., 810 F.2d 164 (8th Cir. 1987) 22

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977) ..... *passim*

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) 9, 15, 16

Parker v. Wallace, 596 F. Supp. 739 (M.D. Ala. 1984) 17

Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) 23

Perry v. Larson, 794 F.2d 279 (7th Cir. 1986) 15

Price Waterhouse v. Hopkins, 490 U.S 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) 21, 22

Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988) 14

Soderbeck v. Burnett County, 752 F.2d 285 (7th Cir.) *cert. denied*, 471 U.S. 1117 (1985) 14

TABLE OF AUTHORITIES – Continued

Page

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 21

Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989)..... 14

Tye v. Board of Education, 811 F.2d 315 (6th Cir.) *cert. denied*, 484 U.S. 924 (1987) 21

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1982) 21

Walther v. Lone Star Gas Co., 952 F.2d 119 (5th Cir. 1992)..... 21

Yartzoff v. Thomas, 809 F.2d 1371 (9th Cir. 1987) 14

CONSTITUTIONS, COURT RULES

U.S. Const. amend. I..... *passim*

U.S. Const. amend VII..... 23, 24, 25

Sup. Ct. R. 10 7

STATEMENT OF THE CASE

A. Factual History

The evidence admitted at trial showed that Petitioner, Donna Erickson, became the administrative assistant to Respondent Pierce County's prosecuting attorney in February, 1981. As the administrative assistant, she had an important role in the operation of the prosecutor's office, including supervisory duties over other employees, signing on new employees, ordering supplies, assisting in payroll and providing employee lists and budget information, among other duties.

Petitioner remained the administrative assistant to the prosecuting attorney through the transition when William Griffies was elected to the office in 1982. She acted as Griffies' administrative assistant throughout his term as Pierce County's Prosecuting Attorney. In addition, Petitioner and Mr. Griffies had a personal relationship, beginning before Griffies was elected as the prosecutor. When Griffies was up for re-election in 1986, he was defeated by Respondent Ladenburg.

There was also evidence admitted at trial showing that after he lost the election to Ladenburg, Griffies was unwilling to cooperate in an effort to coordinate a transition from him to the new prosecutor. Before he left office, Griffies transferred Petitioner to a different position within the prosecutor's office and gave her the same salary that she had been receiving as his administrative assistant, even though it was higher than the salary of all other employees in the same job. The salary was higher than the salary of those with considerably more experience and higher than the salary of her supervisor.

Because Mr. Griffies had been unwilling to cooperate in the transition, Ladenburg took office with virtually no information about the office's day-to-day operations or its personnel. He had no readily available means of obtaining this information because the two regular employees who had this knowledge – Petitioner and Mr. Griffies' personal secretary – both assumed new jobs. Since Petitioner was still employed in the prosecutor's office, Mr. Ladenburg asked her to continue with the functions she had been doing for the previous five years until his new administrative assistant could begin.

Evidence presented at trial showed that Petitioner knew she was the only one in the office who knew how to perform the administrative assistant's functions. However, she testified that she wanted nothing to do with Mr. Ladenburg and did not want to be involved in any aspect of his administration. Petitioner's attitude was reflected in her work performance. She repeatedly failed to complete the tasks given to her and was openly critical of Mr. Ladenburg. She removed and kept files from the administrator's office without informing anyone she had done so. She transferred the administrator's phone number to the office she used for her new job. She took and retained the checks and records to an account used by the prosecutor. She was uncooperative and hostile towards the changes the new prosecutor was trying to implement. Some of her acts jeopardized funding for the office.

On March 6, 1987, approximately two months into his term, Mr. Ladenburg dismissed Petitioner. In a letter to her, he set forth the specific reasons for the dismissal, which were:

(1) Since January you have displayed a poor attitude toward supervision by staff and have not fully co-operated in transition matters.

(2) Transition work was hindered by your failure to properly list and register new employees.

(3) Items such as extra hire lists and employee wage lists were not provided as requested or were incomplete.

(4) The administrative offices had essential files and documents removed.

(5) The phones for the administrative offices were transferred, creating location problems.

(6) You transferred to a position with lower responsibilities and kept your salary at a high level that is unjustified for that position.

(7) Your past position as administrative assistant and your relationship with employees causes continuing morale problems.

Although Petitioner emphasizes that her job performance during Griffies' term was satisfactory, it was her job performance and conduct after Ladenburg took over the office that was the reason for her dismissal.

Petitioner contended that she was dismissed because of her political support of and relationship with William Griffies. However, she admitted that she was never questioned about her political affiliation and that she was not

aware of any written document or verbal statement indicating political affiliation was a requirement for employment in the Ladenburg administration. She was not aware of any study or statistic relating employment in the Ladenburg administration to political affiliation. The only evidence on which Petitioner relied to support her claim was simply that she had an affiliation with Mr. Griffies and was discharged by Mr. Ladenburg.

Contrary to Petitioner's suggestion, there was no evidence or testimony presented that she was forced to do two different jobs at the same time. Her employment records were admitted at trial and they showed that she never put in more than her regular time in one day.

B. Procedural History

The district court judge, the Honorable Jack E. Tanner, denied Respondents' 12(b)(6) motion to dismiss and motion for summary judgment as to petitioner's First Amendment political patronage claim. Judge Tanner permitted a jury trial on this claim. At the close of Petitioner's case, Respondents moved for a directed verdict on the grounds that the evidence was insufficient to support a verdict in plaintiff's favor. Judge Tanner denied this motion.

Judge Tanner refused to permit Respondents to call witnesses who would have testified that no other employee who supported Mr. Ladenburg's political opponent was dismissed. Judge Tanner also refused to permit Respondents to call Petitioner's supervisor, who would have been critical of Petitioner's performance. In fact, Judge Tanner refused to permit Respondents to call any

witness other than Mr. Ladenburg himself to prove the conduct of Petitioner which led to her dismissal.

Before the case was submitted to the jury, Respondents renewed their motion for a directed verdict based on the sufficiency of the evidence. Judge Tanner denied this motion. The jury found in favor of petitioner and awarded her $25,000. Petitioner brought a post-trial motion seeking a new trial on the issue of damages and Respondents moved for judgment notwithstanding the verdict. Judge Tanner denied Respondents' motion for J.N.O.V. and granted a new trial on the issue of damages. Following the second trial, the jury awarded petitioner $75,000 and Judge Tanner awarded her an additional $109,925.50 as attorneys' fees and $5,992.84 in costs.

Respondents asked the Ninth Circuit Court of Appeals to review Judge Tanner's evidentiary rulings refusing to permit Respondents to present evidence, to review his rulings on Respondents' motions regarding the sufficiency of petitioner's evidence, to review his granting a new trial on damages and to review his attorney fee award. After examining the evidence, the Ninth Circuit reversed and remanded for entry of judgment in favor of Respondents on the grounds that the evidence presented at trial was insufficient to prove Petitioner's political association with Griffies was a substantial or a motivating factor in her dismissal.[1] (Pet. for Cert., App. 1.)

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[1] The Ninth Circuit's decision made it unnecessary for the court to decide the other issues raised by Respondents on appeal.

None of the three Ninth Circuit judges hearing the case dissented and the decision was unanimous. Petitioner sought a rehearing, which the Ninth Circuit denied. (Pet. for Cert., App. 2.) Petitioner suggested a rehearing en banc, which the Ninth Circuit also denied.

SUMMARY OF THE ARGUMENT

No reason exists for the Court to exercise its discretionary jurisdiction to review the judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit's decision does not conflict with any decision of this Court or of another United States court of appeals and does not decide any important question of federal law which needs to be settled by this Court. The Ninth Circuit's decision that the district court erred by not granting Respondents' motion for judgment notwithstanding the verdict rests on its examination of the sufficiency of the evidence presented at trial. There is no special or important reason why this Court should re-examine the record to re-determine the sufficiency of the trial evidence.

ARGUMENT

Petitioner seeks to have the Court re-examine the record without setting forth any special or important reason why the Court should exercise its discretionary jurisdiction to do so.

I. Petitioner Has Failed To Set Forth Any Special Or Important Reasons Why The Court Should Review The Ninth Circuit's Decision.

Considerations governing this Court's review on writ of Certiorari are set forth in Supreme Court Rule 10. Petitioner has failed to set forth any special or important reasons why the Court should review the judgment of the Ninth Circuit.

A. The Federal Law First Amendment Restrictions On Employers Is Clear And Well-Defined; This Case Presents No Issue Which Requires Further Clarification From The Court.

This case presents no important question of federal law which has not been settled by the Court. The Court has previously considered and clearly defined the law pertaining to First Amendment claims for violation of the right of political association in the context of public employment: (1) there must be a violation of First Amendment rights, and (2) the encroachment must not be justified by a legitimate state interest of vital importance. *Elrod v. Burns*, 427 U.S. 347, 360-62, 96 S.Ct. 2673, 1683-84, 49 L. Ed. 2d 547 (1976).

The Court has also previously considered and clearly defined the elements of proof of a First Amendment violation in the context of continued employment: (1) the employee must show that his/her conduct was constitutionally protected, (2) the employee must prove that his/her conduct was a "substantial factor" or a "motivating factor" in the employer's decision to terminate the

employment; and (3) if the first two elements are satisfied, the burden shifts to the employer to show that it would have reached the same decision regarding employment even in the absence of the protected conduct. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L. Ed. 2d 471 (1977).

Petitioner and Respondents agree that the law expressed in *Mt. Healthy* governs this case. The parties' dispute, both in the trial court and in the circuit court of appeals, was whether the evidence presented at trial was sufficient to meet Petitioner's burden of proof. Both Petitioner and Respondents briefed and argued the sufficiency of the evidence presented at the trial before the Ninth Circuit. Respondents argued, and the Ninth Circuit agreed, that the evidence presented at trial was not sufficient to show Petitioner's political support of Griffies was a substantial or a motivating factor in her dismissal. Petitioner failed to cooperate with the transition and affirmatively attempted to hinder Ladenburg's operation of the prosecutor's office. Her obstructionist conduct is not protected by the First Amendment to the U.S. Constitution.

The issues presented to the Ninth Circuit and now represented to this court are highly factual in nature. These fact-oriented issues are particular to the dispute between Petitioner and Respondents alone and will not affect any other present or future case.

B. The Ninth Circuit Did Not Apply A "Substantial Or *Sole* Motivating Factor" Requirement In Conflict With The "Substantial Or *A* Motivating Factor" Requirement Of Other Federal Courts.

Petitioner argues that the Ninth Circuit applied the wrong standard by requiring her to prove her constitutionally protected association with Griffies was the "sole"

motivating factor in her dismissal.[2] The Ninth Circuit's opinion on its face shows that it applied the same standard as it and other courts have applied.

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[2] It should be noted that even though a First Amendment plaintiff's prima facie case requires proof that constitutionally protected conduct was "a" substantial or "a" motivating factor in an adverse employment action, it is nevertheless true that – even if protected conduct was a factor – it is a defense to the action if the employer proves that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

> The *Mt. Healthy* test allows a defendant to terminate an employee for any legitimate reason, *even where, as in Mt. Healthy itself, a reason violative of the First Amendment was also a substantial or motivating factor.*

Nekolny v. Painter, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (emphasis added).

Consequently, there can be no recovery under the First Amendment unless the protected conduct was the sole factor in the adverse employment action:

> Clearly the Board legally *could* have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.
>
> . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should

Petitioner's argument is based on the Ninth Circuit's use of the word "solely" in its opinion in two places. Petitioner has taken the use of this word out of context. Both times the Ninth Circuit used this word, it was merely summarizing Petitioner's contentions:

> Erickson disputes the reasons cited by Ladenburg. *She contends that* her employment was terminated solely because she had supported Griffies during the 1986 election.[3]
>
> . . .
>
> The second element of the Mt. Healthy test requires that Erickson prove that her political support for Griffies was a substantial or motivating factor behind Ladenburg's decision to terminate her. In an attempt to carry this burden, Erickson offered nine circumstantial reasons supporting *her claim that* she was terminated solely for her political beliefs.[4]

> not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Mt. Healthy, 429 U.S. at 285-86.

[3] 960 F.2d at 804 (Pet. for Cert., p. 8a) (emphasis added).

[4] 960 F.2d at 805 (Pet. for Cert., pp. 13a-14a) (emphasis added).

Thus, the Ninth Circuit used the term "solely" only to describe Petitioner's contentions. This was, in fact, what Petitioner contended.

Despite Petitioner's contentions, the Ninth Circuit applied the correct standard:

> Terminations that allegedly violate the First and Fourteenth Amendments are subjected to a three-part test to determine whether constitutional rights have been violated. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989). . . . Second, the employee must prove that the constitutionally protected conduct was *a substantial or motivating factor* behind the termination.[5]
>
> . . .
>
> The second element of the *Mt. Healthy* test requires that Erickson prove that her political support for Griffies was *a substantial or motivating factor* behind Ladenburg's decision to terminate her.[6]

Moreover, the Ninth Circuit's holding leaves no doubt that it applied the correct legal standard:

> A thorough reading of the trial transcript reveals no additional evidence of Ladenburg's motives other than that cited by the parties above. The evidence simply does not support Erickson's claim that her political support for Griffies during the election was *a substantial or*

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[5] 960 F.2d at 804 (Pet. for Cert., p. 11a) (emphasis added).

[6] 960 F.2d at 805 (Pet. for Cert., p. 13a) (emphasis added).

> *motivating factor* in Ladenburg's decision to terminate her. We hold that Erickson failed to satisfy the second element of the *Mt. Healthy* test and that the district court erred by not granting Pierce County's motion for judgment notwithstanding the verdict.[7]

Thus, the Ninth Circuit applied the same standard as this Court and other federal courts and there is no conflict for this Court to resolve.

C. The Ninth Circuit's Holding That, When Viewed In The Context Of The Entire Record, The Circumstantial Evidence In This Case Was Not Sufficient To Support A Verdict Against Respondents Does Not Conflict With The Decisions Of This Or Any Other Federal Court.

The Ninth Circuit expressly considered both the circumstantial evidence Petitioner points to and most of the case law Petitioner cites. It determined that this circumstantial evidence, in light of the other evidence presented at trial, was insufficient to support a verdict against Respondents. This decision does not conflict with any decision of this Court or of another United States circuit court of appeals.

The decisions Petitioner cites involved much stronger evidence than the slight and wholly circumstantial evidence presented by Petitioner. In *Meyers v. City of Cincinnati*, 934 F.2d 726 (6th Cir. 1991), the evidence that the employee's demotion was motivated by his free speech

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[7] 960 F.2d at 805 (Pet. for Cert., p. 17a) (emphasis added).

on affirmative action plans was so strong that the court was able to determine as a matter of law that the employee was forced to retire because of the negative opinions he was believed to have about affirmative action. 934 F.2d at 739.

In *Anthony v. Sundlun*, 952 F.2d 603 (1st Cir. 1991), the new Democratic governor's chief of staff asked for a list of all state employees at a jai alai fronton a few days before the season opened. There were thirteen positions, ten of which were currently filled. The chief of staff consulted members of the Democratic party concerning potential appointees and, on the day before the season opened, advised the hiring agency of thirteen persons who were to take the thirteen positions – twelve of whom were Democrats and the thirteenth a close personal friend of the chief of staff's. All of the persons who had previously occupied the positions were dismissed. 952 F.2d at 603.

In *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990), there was evidence that, shortly before taking office, the newly-elected district attorney told department employees who had supported the former district attorney that he did not intend to retain them as employees. 914 F.2d at 1393. There was also evidence that the newly-elected attorney also blamed the dismissal of one employee on the funding agency and a lack of funds although he himself made the decision and it was undisputed that there were sufficient funds to retain the employee, that he caused the dismissal without ever contending that job performance was in some way inadequate, that he rejected the employee for another vacant position and instead hired his own political affiliate, and

that he fired a total of eleven people who had worked for his predecessor and replaced them with his own political supporters. *Id.* at 1393-94.

In *Schwartzman v. Valenzuela*, 846 F.2d 1209 (9th Cir. 1988), there was evidence that the employee had become involved in a series of disputes with the hospital management, that the hospital's clinical director sent a memorandum warning the employee that he was not authorized to speak out on certain matters, and that the hospital administration did not suggest the employee's conduct was deficient until after he began publicly criticizing the hospital. 846 F.2d at 1212.

In *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987), the plaintiff filed administrative complaints against the employer for Title VII violations and there was evidence that during the pendency of these complaints his supervisors began transferring his job duties and giving him sub-average performance ratings. 809 F.2d at 1376.

In *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir.) *cert. denied*, 471 U.S. 1117 (1985), the first thing the newly elected Sheriff did upon taking office was to fire the wife of the former Sheriff. 752 F.2d at 287. (There is a significant difference between evidence that a person was fired immediately upon the new official's taking office – *i.e.* before he or she is given a chance to perform his or her job for the new official – and firing a person after two months of unsatisfactory performance, as was the case with Petitioner.)

In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the acting sheriff, a Republican, terminated the employment of a deputy who was a Democrat by handing him a letter

that read, "I feel that since you have been campaigning against me I must in all good faith to the Republican Party and myself release you from duty." The defense did not raise any question as to the adequacy of the Deputy's performance. 727 F.2d at 1329.

In *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), there was no factual issue because the defendant admitted that the plaintiff's political affiliation was a substantial or motivating factor in his decisions banning the plaintiff from certain duties. 881 F.2d at 830.

These cases are consistent with the Ninth Circuit's decision below. They differ only insofar as the facts surrounding the employment action in these cases differ from the facts surrounding Petitioner's discharge. Unlike the cases she cites, Petitioner presented no evidence of a connection between her dismissal and her affiliation with the former prosecutor beyond the bare fact of the affiliation itself. The circuit courts of appeal have been consistent in holding that the bare fact of affiliation with a former, defeated elected official is not sufficient to prove a First Amendment violation. *Branchick v. Commonwealth, Dept. of Labor & Industry*, 496 Pa. 280, 436 A.2d 1182, 1184 (Pa. 1981); *Nekolny v. Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

Other cases demonstrate what kind of evidence is sufficient to show an adverse employment action was taken in violation of an employee's First Amendment rights: In *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986), there was corroborated testimony that the successful candidate had made a threatening remark about the

employee's continued employment shortly after the candidacy was announced, there was a five day suspension without a hearing, there was a letter chastising the employee for taking an over-long lunch for being one minute too long, and there was an offer by the candidate that if the employee dropped out of the race, both the suspension and discharge would be dropped. 794 F.2d at 283.

In *Alaniz v. San Isidro Independent School Dist.*, 742 F.2d 207 (5th Cir. 1984), there was evidence of a long history of political patronage in a rural school district, there was evidence that the first day after a new election the new Board president demanded the employment contracts of all employees, the evidence showed that shortly thereafter the plaintiff was dismissed along with many others, and there was evidence that the plaintiff, who had twenty years experience in her bookkeeping position, was replaced by a man with only a high school education and no bookkeeping experience. 742 F.2d at 208-09.

In *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert. denied* 455 U.S. 1021 (1982), there was evidence that the three plaintiffs were dismissed shortly after the new Township Supervisor took office, that one of the defendants' agents told the plaintiffs that the new Supervisor wanted to terminate them because they had campaigned against her, that one of the plaintiffs was replaced by a person who had worked in the new Supervisor's campaign. 653 F.2d 1168.

In *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990), there was evidence that an employer did not permit an employee who opposed proposed ordinance standards

relating to fire safety to attend public meetings on the ordinance, that the employer restricted what the employee could say at meetings he was permitted to attend, that the day after the employee sought a legal opinion in this dispute he was told that a county executive was considering terminating his employment for speaking to persons in the Prosecutor's and Executive's Office, and that he would be terminated if he continued to have contact with the County Prosecutor's Office or the County Council. 918 F.2d at 106 n.4.

In *Parker v. Wallace*, 596 F. Supp. 739 (M.D. Ala. 1984), the governor of Alabama fired a license inspector. There was evidence of a pattern of patronage in the hiring and firing of persons in the plaintiff's position, that the governor relied solely on his campaign coordinator's recommendation to dismiss the plaintiff, that the recommendation did not refer to the plaintiff's job performance but only to political loyalty of the replacement and the defendant raised poor job performance as a justification only after litigation commenced. 596 F. Supp. at 42-43.

When viewed against these cases where there was sufficient evidence to prove conduct protected by the First Amendment was a substantial or motivating factor in an employee's dismissal, it becomes clear that the circumstantial evidence presented at trial by Petitioner was extremely weak. Unlike these cases, there was no evidence connecting Petitioner's discharge with any political affiliation: there was no termination letter or evidence from any witness suggesting she was discharged for political reasons; there was no evidence of widespread discharge of employees and appointment of

political supporters; there was no evidence of participation by a political party or campaign coordinators; there was no evidence of prior attempts to suppress Petitioner's speech/political support of Griffies or threats, express or implied, or threats of retribution for the same; etc.

To the contrary, there was evidence admitted at trial putting Petitioner's discharge in context of her conduct after Griffies was defeated. Substantial evidence showed that this was far from a case where an employee was dismissed for no reason other than political affiliation. Petitioner was acting as an instrument of Mr. Griffies' discontent. She refused to do the tasks Ladenburg requested her to do during the transition and she affirmatively interfered with the operation of the prosecutor's office. Respondent Ladenburg did not dismiss Petitioner when he took office. He originally let her remain in the Prosecutor's Office. She was not dismissed until two months later and only after she had refused to perform tasks necessary to keep the office running efficiently during the transition and after she engaged in conduct obstructive to the office.

The Ninth Circuit's determination that, in light of all the evidence in the whole record, Petitioner's circumstantial evidence was legally insufficient to support a verdict against Respondents does not conflict with the cases Petitioner cites or other cases where a political patronage dismissal in fact happened. The Ninth Circuit considered the evidence and arguments Petitioners now put before this court and there is no reason why this court should reconsider the same.

D. Petitioner Incorrectly Asserts That The Second *Mt. Healthy* Element Of Proof Is Necessarily A Factual Issue Which Must Be Decided By A Jury In All Cases.

Petitioner asserts that the second *Mt. Healthy* element of proof, the "substantial or motivating factor" requirement, is necessarily an issue which must be decided by a jury. The authorities cited by Petitioner do not support this assertion. In fact, in one of them, *Gillette v. Delmore*, 886 F.2d 1194 (9th Cir. 1989), the Ninth Circuit affirmed a summary judgment dismissal of a claim for failure to present sufficient evidence to raise an issue of fact on the second *Mt. Healthy* element.

Petitioner misrepresents *Gillette v. Delmore* by citing the decision as authority for the proposition that motivation is a factual issue, and implying that summary judgment is never appropriate on the second ("substantial or motivating factor") *Mt. Healthy* element of proof.[8] First, the Ninth Circuit did not hold that there was a factual issue as to the "substantial or motivating factor" element of proof which could not be resolved on summary judgment. The plaintiff in *Gillette*, a city-employed fireman, alleged that he was discharged as a result of his constitutionally protected comments during involuntary emergency medical treatment of a person which he believed constituted excessive force by the police. As to this charge, the city admitted the incident was a substantial factor in his discharge. 886 F.2d at 1198. The Ninth Circuit

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[8] Pet. for Cert, p. 15.

reversed the summary judgment in favor of the city on the grounds that there were factual issues as to the third *Mt. Healthy* element of proof (*i.e.* the defendant's burden of proving the discharge would have occurred despite the protected activity). *Id.*

Second, as to the fireman's additional allegation that he was discharged for his constitutionally protected political activities concerning the city budget, the Ninth Circuit affirmed the district court's summary judgment in favor of the defendant city on the grounds that the fireman had failed to present sufficient evidence as to the second *Mt. Healthy* element of proof:

> The allegations Gillette makes are not sufficient to meet his burden in opposing summary judgment. There is no evidence that any of his political activities or views caused, or were a substantial factor in, his termination.

Id. at 1199. Thus, *Gillette* is not authority for Petitioner's assertion that the "substantial or motivating factor" element is necessarily a factual issue which cannot be determined as a matter of law. It is itself a decision involving a determination of insufficient evidence on the second *Mt. Healthy* element of proof. The Ninth Circuit's decision in the case at bar is entirely consistent with the *Gillette* decision.

As *Gillette* demonstrates, even though an employer's motivation is purely factual in nature, it can be determined as a matter of law where there is no room for reasonable minds to differ. *See also Meyers v. City of Cincinnati*, 934 F.2d at 729.

Nor do any of the other cited cases support Petitioner's assertion that, on the facts of this case, the sufficiency of the evidence could not be determined as a matter of law where the evidence is too slight to justify a verdict.

Many of the cases Petitioner cites in her petition for certiorari involved no First Amendment claim. *See, e.g. Price Waterhouse v. Hopkins*, 490 U.S 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (claim under 42 U.S.C. § 2000e for sex discrimination); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L.Ed. 2d 403 (1982) (claim under 42 U.S.C. § 2000e for race discrimination); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (claim under 42 U.S.C. § 2000e for sex discrimination); *Giacoletto v. Amax Zinc Corp.*, 954 F.2d 424 (7th Cir. 1992) (claim under 29 U.S.C. § 621 for age discrimination); *Hudson v. Normandy School Dist.*, 953 F.2d 410 (8th Cir. 1992) (claim under 29 U.S.C. §§ 621 for age discrimination); *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992) (claim under 29 U.S.C. § 623(a) for age discrimination); *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987) (claim under 42 U.S.C. § 2000e and 29 U.S.C. § 621 for sex and age discrimination); *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987) (claim under 29 U.S.C. § 621 for age discrimination); *Tye v. Board of Education*, 811 F.2d 315 (6th Cir.) *cert. denied*, 484 U.S. 924 (1987) (claim under 42 U.S.C. § 2000e for sex discrimination); *Mays v. Williamson & Sons, Janitorial Services, Inc.*, 775 F.2d 258 (8th Cir. 1985) (claim under 42 U.S.C. § 2000e for sexual harassment and retaliatory discharge); *Lowe v. Monrovia*, 775 F.2d 998 (9th Cir. 1985) *amended*, 784 F.2d 1407 (9th Cir. 1986) (claim

under 42 U.S.C. §§ 1981, 1983, 2000e for sex and race discrimination); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982) *disagreed with by Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985), *disapproved by Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (claim under 42 U.S.C. § 2000e for retaliation following an employment discrimination complaint). Since no First Amendment claim was at stake, the courts in these decisions did not discuss whether the evidence before them was sufficient to support a verdict on a First Amendment claim.

Of the decisions relied upon by Petitioner which did involve a First Amendment claim, many did not discuss the issue of the sufficiency of evidence on the second *Mt. Healthy* element of proof which is at issue in the case at bar. *See, e.g. Allen v. Scribner*, 812 F.2d 426, 434-36, *amended* 828 F.2d 1445 (9th Cir. 1987) (court's discussion and holding related to third *Mt. Healthy* element of proof); *Missouri National Education Ass'n v. New Madrid County R-1 School Dist.*, 810 F.2d 164 (8th Cir. 1987) (no discussion of sufficiency of evidence to prove any element of prima facie case). In these cases, the "substantial or motivating factor" element of proof was not discussed. They provide no reason why this Court should review the Ninth Circuit's decision.

The cases cited by Petitioner where the evidence was sufficient to establish protected conduct was a substantial or motivating factor in the dismissal of an employee all involved much more substantial evidence than the evidence presented by Petitioner. *See, e.g. Allen v. Scribner*, 812 F.2d at 434-35 (evidence presented showed employer's officials had made comments that the plaintiff

employee was a "troublemaker" and should be removed from his position because he expressed critical opinions to the media which the officials did not approve of); *Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) (letter from department head to university president recommended suspension of tenured professor on grounds that the professor's public statements to the press were falsely critical of members of the University community); *Mabey v. Reagan*, 537 F.2d 1036, 1044 n. 9 (9th Cir. 1976) (one of the stated reasons for dismissal was arguably eligible for First Amendment protection).

Most importantly, these cases have virtually no factual similarities with the case at bar and are of virtually no relevance to the issue of the factual sufficiency of the evidence presented at the trial in this case to support the verdict in Petitioner's favor. Unlike the cases Petitioner relies upon, Petitioner presented no evidence that her protected political speech was the reason for her dismissal. In circumstances such as these, determination of the second *Mt. Healthy* element of proof may properly be made as a matter of law based on the insufficiency of Petitioner's evidence.

E. The Ninth Circuit Did Not Misapply The Standard Of Review Of Judgments Notwithstanding The Verdict And Did Not Violate Petitioner's Seventh Amendment Right To A Jury Trial.

The standard of review applied by the Ninth Circuit is set forth in the court's written opinion:

> Challenges to the sufficiency of the evidence, and the denial of a motion for judgment notwithstanding the verdict, are reviewed de novo to determine if the plaintiff's claims were supported by substantial evidence. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013-14 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059, 88 L. Ed. 2d 778, 106 S. Ct. 802 (1986). It is error to deny a judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Transgo*, 768 F.2d at 1014; *accord Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985) (directed verdict is "inappropriate if there is substantial evidence to support a verdict for the non-moving party"), *cert. denied*, 475 U.S. 1122, 90 L. Ed. 2d 187, 106 S. Ct. 1642 (1986).

960 F.2d at 804 (Pet. for Cert., p. 10a). Petitioner cites no authority suggesting that this standard of review is inappropriate. Petitioner cites different decisions setting forth the standard of review, but does not identify how these decisions indicate a standard of review which conflicts with the one applied by the Ninth Circuit. Nor does Petitioner identify any other reason why the Court should review the Ninth Circuit's decision.

The standard of review applied by the Ninth Circuit is consistent with the Seventh Amendment. The Seventh Amendment right to a jury trial expressly permits courts of the United States to re-examine facts tried by a jury in accordance with the rules of the common law. (Appendix 1) Directed verdicts and judgments notwithstanding the verdict, as procedural safeguards insuring the parties and the system against improper outcomes, have long been a

feature of the common law. *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983). Petitioner cites no authority indicating that a circuit court violates a litigant's Seventh Amendment right to a jury trial by correcting a district court's error in failing to grant a judgment notwithstanding a verdict which should have been granted. Petitioner merely repeats ad nauseam rules about the standard of review of a motion for judgment notwithstanding the verdict, all of which are consistent with the Ninth Circuit's review.

Petitioner contends that there was sufficient evidence to support the verdict in her favor, but the Ninth Circuit reviewed the evidence she identifies and determined that it was not legally sufficient to support a verdict. *Connell v. Sears, Roebuck & Co., supra*, the authority relied upon by Petitioner, makes it clear that:

> Deference due a jury's fact findings in a civil case is not so great, however, as to require acceptance of findings where, as here, those findings are clearly and unquestionably not supported by substantial evidence. To so hold would be to render a trial and the submission of evidence a farce.
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> . . .
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> . . . If the facts found on substantial evidence be insufficient to support or contrary to a jury's legal conclusion, or if the facts found, though they would be capable of supporting the legal conclusion, were based on evidence less than substantial, a judge may, following the guidelines set forth above, grant the motion.

722 F.2d at 1546. The Ninth Circuit's decision that the evidence presented by Petitioner was insufficient to support the jury's verdict is consistent with this rule of *Connell v. Sears*.

F. Other Reasons Indicate That The Court Need Not Expend Its Time In Considering The Ninth Circuit's Decision In This Case.

There was no dissent in the Ninth Circuit's decision. Petitioner's request for a rehearing was denied. Petitioner's suggestion of a rehearing en banc was also denied. The Ninth Circuit does not perceive an inconsistency with its own decision or with decisions of other federal courts.

There are also other reasons supporting the Ninth Circuit's judgment. There was substantial evidence of legitimate grounds for dismissing Petitioner. There was considerable intervention by the district court which prejudiced Respondents, including onerous exclusions of relevant evidence and witnesses and manipulation of verdicts, which likely would have caused the Ninth Circuit to reach the same decision.

CONCLUSION

Petitioner calls poor attitude, moving phone lines and files, poor performance in job duties and causing morale problems "petty and amorphous."[9] Respondents

[9] Pet. for Cert., p. 23.

call this conduct unprotected by the First Amendment and legitimate reason for her dismissal.

There is no need for the Court to re-review this case. The Court has previously defined the law pertaining to First Amendment claims for violation of the right of political association in the context of public employment. The Court has previously defined the elements and burden of proof in political patronage cases. The Ninth Circuit followed the Court's decisions and rendered its decision in this case after reviewing the entire record.

The Ninth Circuit's decision that the evidence presented by Petitioner was insufficient to support a verdict in her favor was unanimous. Its decision does not conflict with the decisions of other courts cited by Petitioner. It did not fail to consider the evidence Petitioner identifies, but merely held that the evidence was not sufficient in this case. The Ninth Circuit's denial of Petitioner's request for a rehearing and suggestion of en banc review were denied, indicating that the Ninth Circuit does not perceive a conflict with any other court.

Petitioner has failed to set forth any special or important reason why the Court should exercise its discretionary jurisdiction to review the judgment of the Ninth Circuit in this matter. Consequently, the Court should

enter an order denying the petition for a writ of certiorari.

Respectfully submitted,

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AMENDMENT VII [1791].

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.